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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1034

RAYMOND R. BIRCH AND BIRSEN N. BIRCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 470 F. 2d 808.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1972. A petition for rehearing was denied on December 29, 1972. The petition for a writ of certiorari was filed on January 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to try petitioners for an alleged extraterritorial violation of 18 U.S.C. 499.

2. Whether the evidence was sufficient to convict petitioner Birsen Birch of the offenses charged in counts

1 and 2 of the indictment.

3. Whether, pursuant to counts 3 through 6 of the indictment, the government had to prove that petitioners, in leaving Germany, actually exhibited their false military leave orders to airline officials.

4. Whether the district court properly excluded petitioners' evidence in support of the defense of justification and duress.

STATEMENT

A six-count indictment returned by the grand jury for the District of Maryland charged petitioners with making, using and possessing false military leave orders and with impersonating persons to whom such leave orders were duly issued, all in violation of 18 U.S.C. 499 and 2. After waiving a jury trial, petitioners were tried before the United States District Court for the District of Maryland and convicted as charged. Petitioner Birsen Birch was sentenced to five years' imprisonment pursuant to the terms of 18 U.S.C. 4208(b). Petitioner Raymond Birch was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial showed that Raymond Birch, a civilian employee of the United States Military Exchange ("PX") system in the Federal Republic of Germany ("West Germany"), and his wife, Birsen Birch, were convicted in a German court on October 15, 1970, of having abused, tormented, mistreated and neglected a young Turkish domestic, one Naide Ercelebi Karapinar, who lived with petitioners and helped care for their children (Tr. 48-49, 227-228, 340, 346, 450). Raymond Birch was sentenced to eighteen months' imprisonment; Birsen Birch was sentenced to forty-two months' imprisonment (Tr. 22). The charges had first been placed against petitioners in

February 1967, at which time they were arrested and later released upon condition that "all documents of identity and travel documents" be delivered to German authorities (Tr. 14, 17-18). Following their German conviction, petitioners were again released, pending appeal, but their passports were retained by German authorities (Tr. 23-23A, 266). Petitioners were advised that resolution of the appeal would take at least two years (Tr. 270).

In November 1970, Birsen Birch twice visited the residence of a neighbor, United States Army Sergeant Edwards, whom petitioners thought might be able to help them leave Germany (Tr. 29, 276). At Mrs. Birch's request, Edwards went to petitioners' residence, where they informed him "that they wanted to leave Germany" (Tr. 30). They discussed with Edwards the fact that they could not leave Germany "as civilians because the Germans had taken their passports" and they asked Edwards to arrange for them to "go out military" (Tr. 31). After Edwards agreed to help the three discussed the various "I.D. cards, shot records and leave orders" that would be necessary to effect their flight (Tr. 31-32). Because Raymond Birch did not have the proper "military bearings," they rejected the idea of fleeing in military uniforms (Tr. 31).

Several days later, Edwards and petitioner Raymond Birch agreed that the best escape plan would be for petitioners, posing as American military personnel and using military documents and credentials, to secure commercial airline passage (Tr. 277, 281). Thereafter, Edwards prepared false "shot records" in the name of Jack L. Finn and Vivian L. Finn, both rated Sergeant First Class (Tr. 33-34). Edwards then prepared corresponding military I.D. cards, attached to which were photographs taken while petitioners posed behind placards bearing the names of Jack L. Finn and Vivian L. Finn (Tr. 37-39). Finally, Edwards prepared ten copies of false military leave orders for each

petitioner and turned these orders over to Raymond Birch at petitioners' residence (Tr. 55-56).

On December 9, 1970, Raymond Birch and Edwards drove to Frankfurt Airport. With money supplied by Raymond Birch, Edwards there obtained a ticket in the name of Mrs. V. Finn for a December 10th Pan American flight from Frankfurt to New York and a ticket in the name of Jack L. Finn for a December 10th Lufthansa flight from Munich to New York (Tr. 58-61). That same night, Raymond Birch, dressed in civilian clothes, boarded a train bound for Munich. The following morning, Birsen Birch, dressed in civilian clothes and wearing a wig, boarded the Pan American plane after presenting her false shot records and I.D. card to a German official (Tr. 63-65). Upon arrival at Kennedy Airport, New York, on December 10, petitioners completed customs declarations using the names Jack L. Finn and Vivian L. Finn (Tr. 96-98). Raymond Birch, upon request, also gave customs officials a copy of the leave orders issued in the name of Jack L. Finn (Tr. 96, 386). The addresses on the leave orders and customs declarations were fictitious (Tr. 98). Birsen Birch, in completing her customs declaration, copied the address from her I.D. card or leave orders, which she was carrying in her pocketbook (Tr. 426).

ARGUMENT

1. In petitioners' view the district court lacked jurisdiction to try them for alleged violations of 18 U.S.C. 499, because the indictment allegedly focused on fraud committed in Germany against agents of civilian airlines.[1]

[1] 18 U.S.C. 499 provides: "Whoever falsely makes, forges, counterfeits, alters, or tampers with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with intent to defraud uses or possesses any such pass or permit, or personates or falsely represents himself to be or not to be a person

Section 499 prohibits the counterfeiting of military passes or permits, the use or possession of such documents with intent to defraud, and the impersonation of one to whom such documents have been duly issued. Since, as the court below noted, counterfeiting and misuse of military passes are "a species of fraud against the government" (Pet. App. 5a), Section 499 includes by implication acts committed in foreign countries. See *United States* v. *Bowman*, 260 U.S. 94, 97. Moreover, as the court below also pointed out (Pet. App. 5a-6a), since Section 499 was originally enacted in 1917 when the United States was preparing to send armed forces to Europe,[2] Congress must have intended Section 499 to protect against forgery of American military passes—whether at home or abroad.

Furthermore, contrary to petitioners' contention (Pet. 16), the indictment here did not focus "only on whether petitioners committed a fraud upon agents of civilian airlines in Germany." In none of the six counts did the indictment specify that petitioners intended to defraud a particular person or entity. Rather, tracking the language of 18 U.S.C. 499, the indictment charged in counts 3 through 6[3] that petitioners "did, with intent to defraud" use and possess false military passes and falsely represented themselves to be persons to whom such passes had been duly issued.

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to whom such pass or permit has been duly issued, or willfully allows any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

The indictment is reprinted in full at Pet. App. 9a-12a.

[2]Act of June 15, 1917, Pub. L. 24, c. 30, § 3, 40 Stat. 228.

[3]Pet. App. 10a-11a.

2. Petitioner Birsen Birch contends (Pet. 30) that the evidence was insufficient to establish her participation in falsifying leave orders in the names of Jack and Vivian Finn, as charged in counts 1 and 2 of the indictment. Evidence at trial revealed, however, that Birsen Birch was the one who initially contacted Sergeant Edwards "about this matter" (Tr. 80). Birsen Birch, believing that Sergeant Edwards might help petitioners leave Germany, twice visited Edwards at his home and persuaded Edwards to come to petitioners' residence, where petitioners asked him to help them flee Germany. She was present during the first planning session, when, after Edwards consented to help petitioners "go out military," agreement was reached to falsify government credentials. Birsen Birch travelled seventeen miles to pose for an I.D. photograph behind a "Vivian L. Finn" placard, arranged by Edwards and herself (Tr. 39, 328). She took possession of the falsified Vivian L. Finn shot records, I.D. card and leave orders, and made them her own (Tr. 65, 426). In such circumstances, Birsen Birch at the very least "aided and abetted"[4] her husband and Edwards in committing the crimes charged in counts 1 and 2.

3. Petitioners argue that the government failed to prove under counts 3 through 6 that they actually exhibited their leave orders to German officials in boarding the aircraft in Germany. However, as noted by the court below, "display of the forgeries is not an element of the crimes defined by the statute" (Pet. App. 6a). Edwards left the packet of falsified leave orders at petitioners' residence. Petitioners carried the leave orders on board the aircraft (Tr. 96, 386, 424, 426) and used airline tickets issued to Jack L. Finn and Mrs. V. Finn. Hence, in accord with the

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[4]The indictment charges petitioners with violations of 18 U.S.C. 2 as well as 18 U.S.C. 499 (Pet. App. 9a).

offenses described in 18 U.S.C. 499, they *possessed* false military leave orders with intent to defraud (counts 3 and 4) and they held themselves out to be persons to whom leave orders had been duly issued (counts 5 and 6). Moreover, although counts 3 and 4 were framed in the conjunctive ("use and possess") while 18 U.S.C. 499 is framed in the disjunctive ("use or possess"), under established principles the government was only required to prove "use" *or* "possession." See *United States* v. *Ippolito*, 438 F. 2d 417 (C.A. 5), certiorari denied, 402 U.S. 953; *United States* v. *Minchew*, 417 F. 2d 218 (C.A. 5), certiorari denied, 397 U.S. 1014; *McGriff* v. *United States*, 408 F. 2d 333 (C.A. 9).

4. Petitioners also contend that the trial court erred in rejecting evidence relating to their proffered defense of justification and duress, which they based on their allegations that their trial in Germany had been unfair and that they were in fear of "unjustified incarceration" (Pet. 25). The trial court gave the following reasons for its ruling: "at the time when the defendants left the area of Germany and returned to the United States, they were prosecuting an appeal in the case in Germany, which appeal had not yet been heard and the outcome of which, it seems to the Court at least, is entirely problematical in that under those circumstances they weren't faced with the imminent and immediate threat of harm that the law of justification, as the Court understands it, contemplated" (Tr. 164). In other words, while an act committed under the compulsion of threats of immediate bodily harm or death may be involuntary and thus not criminal,[5]

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[5]See *United States* v. *Palmer*, 458 F. 2d 663, 665 (C.A. 9); *Castle* v. *United States*, 347 F. 2d 492 (C.A. D.C.), certiorari denied, 381 U.S. 929; *D'Aquino* v. *United States*, 192 F. 2d 338, 358 (C.A. 9), certiorari denied, 343 U.S. 935.

here petitioners not only did not suffer the kind of compulsion that would reasonably induce fear of bodily harm or death, but also their threatened harm—imprisonment—was not immediate since no incarceration was possible until after their appeal was decided two years hence.[6] If petitioners were in fear of imprisonment after an unfair trial, they should have stayed in Germany and prosecuted their appeal; to excuse their using forged documents to flee Germany would be tantamount to saying that anyone convicted in a State court may flee the jurisdiction if he believes he has been unjustly convicted and is in fear of imprisonment at some later date. To be sure, it may have taken some firmness on petitioners' part for them to stay in Germany, but the law excuses otherwise criminal conduct only when anyone other than a person of extraordinary will power would have succumbed to the pressure. That is not the situation in this case where the anticipated harm stems from a judgment of conviction that was on appeal and that would not have been carried out for at least two years.[7]

While the defense of justification was therefore not available to petitioners, the district court did permit them to introduce evidence to show "that as a result of the proceedings in Germany the defendants, individually or together, were so mentally distraught that they were incapable, mentally, of forming the intent that seems to be contemplated by the statute * * *" (Tr. 169); and peti-

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[6]Even under the Model Penal Code, on which petitioners rely, the lack of any threat of immediate harm tends to show that the person's belief in the necessity for committing the crime was not genuine. Model Penal Code, Tent. Draft No. 8, p. 10 (1958).

[7]We note that Section 610 of the Proposed New Federal Criminal Code provides that duress is an affirmative defense in felony prosecutions only when the actor was compelled to engage in the criminal conduct "by threat of imminent death or serious bodily injury to himself or another."

tioners testified about the circumstances surrounding their German convictions and their own mental and financial condition at the time.[8]

Furthermore, petitioners successfully persuaded the district court to refuse to accept into evidence the findings and opinion of the German court (Tr. 394-398). In these circumstances petitioners should not be heard to complain that the trial court improperly refused to "look behind" their German convictions (Pet. 17). The evidence that was before the court regarding petitioners' emotional condition, including the testimony of a psychiatrist (Tr. 437-466), could properly be taken into account in their sentencing even though the evidence was not sufficient to show that petitioners lacked the requisite criminal intent.[9]

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[8]On cross-examination, the government elicited evidence tending to show that the desire to flee Germany was not based on compelling fear of unjust punishment but on the rather ordinary motive of avoiding the potentially adverse consequences of the pending legal proceedings. Petitioner Raymond Birch admitted that their German trial lasted about six weeks (Tr. 369); that their young Turkish housekeeper said she had been beaten by Mrs. Birch with a hot poker (Tr. 364); that neighbors said they had heard noises coming from the Birch's house (Tr. 359); that photographs of the victim's burns and bruises, as well as testimony about her physical appearance, was introduced (Tr. 371-372); and that various doctors, including dermatologists and a gynecologist, testified about their findings regarding the use of the hot poker around the victim's genitals and the condition of her skin (Tr. 372-373). Mr. Birch also stated that in a completely separate civil proceeding the victim had recovered $26,000 from them so that she could have plastic surgery and that the Birches have never paid this judgment against them (Tr. 375-378).

[9]At the sentencing stage the court also considered a summary of the transcript of the German proceedings (Sentencing Tr. 23-24) and with regard to the instant offenses, concluded:

> The Court doesn't view the offense with which they stand charged here today in the same light that you do [defense counsel]. The Court considers it a serious offense which was,

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1973.

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from the evidence in the case before me, deliberately, intelligently, consciously, and voluntarily entered into by the Defendants. * * * And at the time they had counsel in Germany who surely could have advised them that what they contemplated doing involved more than a breach of an Army regulation, but instead would be a breach of a felony statute of the Congress.